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In The Supreme Court of the United States

MARCUS A. BORDEN,

Petitioner,

v.

SCHOOL DISTRICT OF THE TOWNSHIP OF EAST BRUNSWICK, NEW JERSEY, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, DAVID HOROWITZ FREEDOM CENTER, INDIVIDUAL RIGHTS FOUNDATION, THE JUSTICE FOUNDATION, AND ALLIANCE DEFENSE FUND IN SUPPORT OF PETITIONER

EDWIN MEESE III
Of Counsel
SOUTHEASTERN LEGAL FOUNDATION
6100 Lake Forrest Drive, N.W.
Suite 520
Atlanta, GA 30328
(404) 257-9667

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
6100 Lake Forrest Drive, N.W.
Suite 520
Atlanta, GA 30328
(404) 257-9667

Counsel for Amici Curiae Southeastern Legal Foundation, et al.

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[List Of *Amici* Continues On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MANUEL S. KLAUSNER
DAVID HOROWITZ FREEDOM CENTER
AND
INDIVIDUAL RIGHTS FOUNDATION
One Bunker Hill Building
601 West Fifth Street
Suite 800
Los Angeles, CA 90071
(213) 617-0414

ALLAN PARKER
THE JUSTICE FOUNDATION
8122 Datapoint
Suite 812
San Antonio, TX 78229
(210) 614-7157

BENJAMIN W. BULL
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

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INTEREST OF *AMICI CURIAE*

The entities participating in this brief share an abiding interest in the fair and equitable application of the Establishment Clause within First Amendment jurisprudence. From a public interest perspective, the entities assert that a fair application of the Establishment Clause does not include purging *de minimis* signs of respect for constitutionally protected religious practices. The historical meaning of the First Amendment does not contemplate prohibiting a public official or employee from respectfully recognizing students' private religious expression because such a prohibition chills and demeans that constitutionally protected expression.

Southeastern Legal Foundation, Inc. ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court of the United States.[1]

The Individual Rights Foundation ("IRF") was founded in 1993. It is the legal arm of the David

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[1] Counsel of Record for the parties received timely notice of *Amici Curiae's* intent to file this brief and have provided written consent to its filing. No counsel for a party authored the brief in whole or in part nor made any monetary contribution intended to fund the preparation or submission of the brief.

Horowitz Freedom Center ("DHFC"), a non-profit 501(c)(3) organization. The mission of DHFC is to promote the core principles of free societies – and to defend America's free society – through educating the public to preserve traditional constitutional values of individual freedom, the rule of law, private property and limited government. In support of this mission, the IRF litigates cases and, together with the DHFC, participates as *amicus curiae* in appellate cases, such as the case at bar, that raise significant First Amendment speech and Establishment Clause issues.

The Justice Foundation (formally the Texas Justice Foundation) was founded in 1993 to protect the fundamental freedoms and rights essential to the preservation of American society. The Justice Foundation represents clients free of charge in cases in the areas of limited government, free markets, private property, parental school choice, parental rights in education, and enforcing laws to protect women's health. The Justice Foundation is a non-profit, public interest litigation firm supported by tax-deductible contributions.

Alliance Defense Fund ("ADF") is a non-profit, public interest organization devoted to the defense of religious freedom. ADF pursues its goal of protecting religious liberty by providing strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties. ADF and its allied organizations represent thousands of Americans who desire to maintain their right to religious expression. ADF has been directly or indirectly involved in at least

500 cases and legal matters, including numerous religious expression cases before the United States Supreme Court, including *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001); and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

ISSUE PRESENTED

By holding that high school Coach Borden's secular gestures of respect offered at the time his players initiated and led prayer in a non-public forum violated the Establishment Clause, the Third Circuit acted contrary to the rights of students, Coach Borden's duty to act in a neutral, non-hostile manner toward the students once they chose to pray and this Court's precedent. The three opinions by the Third Circuit exemplify the confusion that plagues the lower courts and attorneys who must advise not only school boards and administrators, but also parents with children in our public school systems. The result of this ongoing uncertainty is unpredictable litigation. This Court's jurisprudence and tests should provide understandable precedent, resulting in clear administrative policies and processes within the public school setting. Has the Third Circuit plurality's confused misapplication of this Court's Establishment Clause jurisprudence in a public school setting, as well as the conflict between the Circuits identified by petitioner, provided the sound basis for this Court to grant a *writ of certiorari* to the petitioner?

SUMMARY OF ARGUMENT

Coach Borden's demonstration of respect for player-initiated and player-led prayer does not rise to the level of an Establishment Clause violation. The Third Circuit misapplied the Court's holdings regarding acceptable behavior by school districts involving student-initiated, student-led private speech. The Court in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) detailed the amount of state entanglement necessary to transform student speech into coercive government speech bearing the school's imprimatur. None of these factors are present with the student prayers occurring in the East Brunswick School District. The players' prayers are not transformed from private speech into government speech because of the presence of Coach Borden or by his secular demonstration of respect.

Beyond the formalism of policies and attribution, courts must also look to the effect school directives have on students. If school districts promulgate policies that effectively chill students' constitutionally protected speech, they engage in viewpoint discrimination. The East Brunswick School District, historically and through the current policy, creates an environment hostile to religion. This atmosphere of intolerance toward religious viewpoints violates not only the Court's Establishment Clause mandate of religious neutrality, but also the broader First Amendment mandate of protection *against* viewpoint discrimination.

The Court's Establishment Clause jurisprudence is as confusing as it is voluminous. The different tests the Court employs force lower courts and attorneys into an inefficient "guessing game" as to the proper course of analysis. Further, all of the Court's current approaches lack the neutrality toward religion demanded by the Constitution. The Court should grant the petition for *writ of certiorari* in order to articulate a single Coercion test that discounts passive and symbolic government speech, while still barring government coercion of religion. This test will provide necessary guidance to the lower courts, protect all viewpoints and remain faithful to the Clause's true meaning.

ARGUMENT

I. The Third Circuit failed to recognize the sharp contrast between the pro-prayer policy found unconstitutional by the Court in *Santa Fe* and East Brunswick School District's facially neutral prayer policy, resulting in a holding contrary to this Court's precedent.

The lead opinion in *Borden v. Sch. Dist. of the Township of East Brunswick, New Jersey, et al.*, 523 F.3d 153, 175 (3d Cir. 2008), relied heavily on *Santa Fe*, which the Third Circuit rightly identified as the "leading case" concerning prayer at high school football games. But, the Third Circuit fundamentally misinterpreted and misapplied this Court's reasoning

for holding unconstitutional the prayers at issue in *Santa Fe*. This Court laid out a litany of missteps the Santa Fe School District ("SFSD") committed in adopting the religious speech at issue as its own, therefore violating the Establishment Clause. Some of the factors this Court identified only marginally applied to the East Brunswick School District ("EBSD" or "the District") and, indeed, others were polar opposite to the circumstances in *Santa Fe*. In rejecting the SFSD's claims, this Court noted: "The delivery of [the prayers] – over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer – is not properly characterized as 'private' speech." 530 U.S. at 310. The Third Circuit failed to acknowledge that the EBSD policy limited its application to employees and did nothing to further or encourage prayer by the students.

A. The EBSD prayer policy was distinguishable from the *Santa Fe* pro-prayer policy because EBSD promulgates a facially neutral prayer policy that only addressed employee behavior.

The Third Circuit erroneously applied *Santa Fe* by failing to recognize that, despite the fact that the EBSD policy addresses only employee speech in the prayer context, the policy nevertheless causes grave harm to students' 'private' speech (student-initiated,

student-led prayer) which would otherwise enjoy the protections of the First Amendment. Analysis of an alleged government Establishment Clause violation must include the government's official policy toward the religious action involved and the effects of that policy. The government's policy and what government officials say regarding that policy represents the easiest and most straightforward way to discern the government's posture toward religion. *This posture must be completely neutral – neither hostile nor overtly favoring – in order to withstand constitutional scrutiny. Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (emphasis added). This Court found the SFSD violated the Establishment Clause by promulgating a pro-prayer policy. 530 U.S. at 305. The Court considered at length how the SFSD "explicitly and implicitly encouraged prayer," thereby conveying both a "perceived and actual [government] endorsement" of prayer. *Id.* at 305, 310. The Court noted how the SFSD policy "invites and encourages religious messages." *Id.* at 306. The Court also expressed concern about how the policy's text produced only one clearly preferred message – a religious message. *Id.* at 315. The Court determined this governmental favoritism, expressed through the school's policy, was coercive in nature and violated the constitutional mandate of religious neutrality. *Id.* at 307-10.

The EBSD expresses no such governmental favoritism toward student prayers. The Third Circuit glossed over this key distinction in finding Coach Borden's actions constituted an Establishment Clause

violation. The EBSD's policy in no way "explicitly or implicitly" encourages student prayer. Unlike the policy in *Santa Fe*, the EBSD's policy is "hands off." *Santa Fe*, 530 U.S. at 305. The EBSD policy, while conceding the players have a right to pray, relinquishes all editorial control to the players. The policy consists of a list of actions in which school employees shall not engage when the students pray, and the consequences of any disobedience. *Borden*, 523 F.3d at 160-61. The Court concluded in *Santa Fe* that the purpose of the pro-prayer policy was to preserve a popular "state sponsored religious practice." 530 U.S. at 309 (quoting *Lee v. Weisman,* 505 U.S. 577, 596 (1992)). The EBSD policy targets the exact opposite goal: to dissolve completely any association the District has with a religious practice. The Third Circuit, while it acknowledged the pro-prayer policies in *Santa Fe*, failed to recognize the stark contrast with the EBSD policy. The SFSD's pro-prayer policy, and the atmosphere it created, formed the basis for the Court's holding in *Santa Fe*. The Third Circuit relied on this "leading case on high school prayer" without acknowledging the crucial difference between the respective policies' effects, thereby misapplying the bright line articulated in *Santa Fe*.

B. The Third Circuit failed to recognize the protected private nature of the students' speech and incorrectly held that Coach Borden's demonstration of respect for the students' speech transformed that speech into impermissible government endorsement of religion.

Because the Third Circuit failed to recognize the protected private nature of the player-initiated, player-led prayers, Coach Borden's actions were improperly relegated to the ash heap of "impermissible government endorsement." In *Santa Fe*, the Court was clearly concerned about the likelihood of school attribution. 530 U.S. at 308. In that case, a student broadcast the prayer over the school's public address system and addressed it to the general-public in a "ceremony . . . clothed in the traditional indicia of the school's sporting events." *Id.* The Court found this action to be a coercive religious message indicating school approval. No such imprimatur argument is possible with student prayers in the EBSD. One of the prayers occurs within the confines of the football locker room where the District only allows authorized personnel. *Borden*, 523 F.3d at 159. The second prayer before the pre-game meal occurs in the school cafeteria, where the prayers include the team, in some cases the cheerleaders and other invited guests. *Id.* The prayers are student-initiated, student-led and constitute private speech.

Student-initiated, student-led prayer is constitutionally protected private speech. As the Court noted,

private religious speech, hardly an "orphan," is fully protected under the First Amendment. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). The EBSD recognizes as much in its policy, which allows student-led prayer and cedes editorial control of that speech. This private student speech bears none of the school imprimatur factors troubling the Court in *Santa Fe*. To be sure, the students in the instant case pray at a school-sponsored event and wear the school's athletic uniforms, but the Court in *Santa Fe* carefully acknowledged not all speech occurring under these circumstances is government speech. 530 U.S. at 302.

The question is whether Coach Borden, who does not lead or participate in the prayers, but merely demonstrates respect for his players' private choice to pray, transforms the students' private speech by his actions into impermissible government religious speech? The Court in *Santa Fe* answered this question by detailing the amount of school involvement required to convert student private religious speech into speech impermissibly bearing the State's imprint. Aside from a pro-prayer policy, the Court detailed associative factors required for this transformation. A school district must "affirmatively sponsor" the speech, imbuing a high "'degree of involvement,'" and thereby putting "'school age children in an untenable position.'" *Id.* at 313; *id.* at 305 (quoting *Lee*, 505 U.S. at 590).

The EBSD, however, does not engage in any prayer "involvement" or "sponsorship," and thus the

prayers involve no coercion. Neither the District nor Coach Borden affirmatively sponsors the prayers, and the prayers, if they occur, are student-initiated and student-led. Coach Borden, in his email to the team captains, explained the choice to pray was completely in their hands and he would abide by whatever they wished. *Borden*, 523 F.3d at 162. Neither the District nor Coach Borden is involved with the prayers' selection, formation or content. Finally, according to school policy, it is completely at the players' discretion whether they pray, for what they pray, or even to whom they pray. At all times, the speech is controlled by students, in the private sphere, and free of State coercion, where the Court permits it. *Lee*, 505 U.S. at 589. The *Borden* lead opinion essentially recognized the non-coercive, non-transformative nature of Coach Borden's actions. Judge Fisher held that *but for* his prior prayer history, the mere demonstration of respect constituted just that – a demonstration of respect for his players' private speech. 523 F.3d at 178-79. Judge Barry's concurrence agreed with that assessment. *Id.* at 188. The district court went further by discarding the prior prayer history element. *Id.* at 164. Coach Borden's passive, symbolic demonstration of respect for his players' private choice to pray does not rise to the level state involvement found in *Santa Fe,* transforming private student speech into government speech.

The question of the degree to which government involvement rises to the level of coercion is examined by the Eleventh Circuit after *Santa Fe*. In *Chandler*

v. Siegelman, 230 F.3d 1313, 1315-16 (11th Cir. 2000),[2] the Eleventh Circuit, while not addressing the issue of government employee involvement,[3] grasped the Court's key *Santa Fe* distinctions. Unlike the Third Circuit, the Eleventh Circuit understood the difference between impermissibly coercive school-sponsored religious speech – bearing the school's imprimatur – and private student speech protected by the First Amendment. The Eleventh Circuit found the state's policy of permitting non-proselytizing, non-sectarian, student-initiated prayer at school-sponsored events, including graduations and football games, did not violate the Establishment Clause. *Id.*

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[2] In *Chandler I*, *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), decided prior to *Santa Fe*, the Eleventh Circuit found against plaintiffs who were challenging a school district policy based on State law that permitted student-initiated prayer at school functions. *Chandler v. Siegelman*, 230 F.3d at 1314. The plaintiffs then filed for *certiorari*. On June 19, 2000, this Court decided *Santa Fe*. Then, on June 26, 2000, this Court granted plaintiffs' *writ of certiorari* in *Chandler I* and vacated the Eleventh Circuit's judgment to allow consideration on remand in light of *Santa Fe*. The Eleventh Circuit then found that *Chandler I* was not in conflict with *Santa Fe*, reaffirming and reinstating it in *Chandler v. Siegelman*, 230 F.3d at 1317.

[3] In *Chandler I*, the Eleventh Circuit did not directly address the issue. The Eleventh Circuit held in part that a school district could not "prescribe prayer or allow state employees to lead, participate in or otherwise endorse prayer of any type during curricular or extracurricular events." *Chandler I*, 180 F.3d at 1257 (*See also id.* at n.4.) In addition, the court held that for teacher supervision of student-initiated, student-led prayer to be unconstitutional, "it must cross the line into active endorsement, encouragement or participation." *Id.* at 1265.

at 1317. The Eleventh Circuit pointed out that the *Santa Fe* holding "does not obliterate the difference between state speech and private speech at school sponsored events . . . nor does it hold that all religious speech is inherently coercive" in this context. *Id.* at 1316. The Eleventh Circuit noted that in *Santa Fe,* the speech was coercive because the school district entangled itself with the prayers to a degree where the speech became the school's, not because the prayers occurred at a school-sponsored event. The Eleventh Circuit correctly interpreted *Santa Fe* as *only forbidding state-sponsored coercive religious speech. Id.* Where the State has no involvement in the students' prayer choices, the decision to pray cannot be coercive. Thus, Coach Borden's passive, symbolic demonstration of respect for his players *after* they choose to pray cannot constitute government coercion or state sponsorship of those prayers.

II. The Third Circuit failed to provide First Amendment viewpoint protection to student-initiated, student-led prayer, thereby allowing EBSD's policy to have the effect of chilling constitutionally protected student speech.

This Court has consistently held that students' constitutional rights to freedom of speech and expression are protected within the public school setting. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *see Morse v. Frederick*, 127 S. Ct. 2618, 2637 (2007) (Alito, J., concurring). The Court

has also consistently recognized religious viewpoints in the school context as legitimate and protected by the First Amendment.[4] In this case, when the players pray, they are expressing a constitutionally protected viewpoint, which the government, by its mandate of neutrality, must not only tolerate but also accommodate. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

The EBSD, however, fosters an environment hostile to religion through its policy and actions

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[4] In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393 (1993) the Court held a school district engaged in viewpoint discrimination when it did not allow the presentation of movie from a religious perspective noting, "religious speech is a fully protected subset of free speech." Similarly in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001); the Court again found viewpoint discrimination by a school district not allowing the teaching of morals and character development from a religious perspective. Finally in *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) the Court found viewpoint discrimination by a university refusing funding to a religion-centric extra-curricular magazine. In each of these cases, as with the EBSD, the government's defense for attempting to silence these viewpoints was fear of an Establishment Clause violation. The Court found in each of these cases the violation was actually the schools' own discrimination against students' First Amendment rights. To be sure, these cases involved extra-curricular activities in limited public fora, which the Court failed to extrapolate to the circumstances in *Santa Fe*. 530 U.S. 302-03. However, the Court based its findings on the facts: the speech in question was the government's own and it resulted in coercion. Here, as in the case with extra-curricular activities, the speech involved is pure student speech uncoerced by any government pressure and thus more akin to the situations in *Good News Club*, *Lamb's Chapel* and *Rosenberger*.

regarding religious viewpoints and student speech, *i.e.* prayer. The EBSD purports to take a constitutionally mandated, religiously neutral stance by constructing a policy that forbids employee participation in school prayer. *Borden*, 523 F.3d at 160-61. What *Santa Fe* held and what the Third Circuit failed to consider, however, was that facially neutral policies are not all that are required to achieve true neutrality. As the Court in *Santa Fe* observed, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." 530 U.S. at 307 n.21; *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in judgment); *see also Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534-35 (1993) (making the same point in the Free Exercise context). Thus, the District must take into account the effect a facially neutral policy has on the student body, so its action does not result in "neutrality in name but hostility in fact." *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 261 (1990) (Kennedy, J., concurring in part and concurring in the judgment). If, as in *Santa Fe*, the effect of a school's prayer policy is to make the students with "secular viewpoints" feel awkward, coerced, uncomfortable or not part of a "favored political class," then surely the opposite must also be true. *Lynch,* 465 U.S. at 688 (O'Connor, J., concurring). Facially neutral policies, administered by a government in a manner hostile to religious expression because it makes believers feel awkward,

coerced or uncomfortable, must also be unconstitutional.

The EBSD's policy creates a condition that directly harms and discourages otherwise protected student-led prayer. The effect on the players resulting from EBSD's religiously hostile policy is uncontroverted. Team captain Nixon testified that forbidding Coach Borden from demonstrating respect for his players' constitutionally protected speech made Nixon and the other players feel awkward, and hurt the team's morale and spirit. (Nixon Decl. ¶ 5.) These effects and emotions experienced by the team are no less coercive *against* student prayer than the coercion *for* student prayer in *Santa Fe*. The EBSD's policies cultivate an environment that chills the students' constitutionally protected speech. The Court in *Lee* stated, "the government may no more use social pressure to enforce orthodoxy than it may use direct means." 505 U.S. at 592. The EBSD attempts to enforce a similar, and no less virulent, secular orthodoxy. The EBSD allows the students to pray, but chills that speech by creating a hostile environment that lowers morale, harms the spirit and causes students who choose to pray to feel awkward and unwelcome.

As the Court in *Santa Fe* noted, the history and context in which schools form policies is important. 530 U.S. at 317 (quoting *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in judgment)). In 1993, the Third Circuit chastised the EBSD for its efforts to explore every legal way

possible to deny religious groups an equal opportunity to meet and discuss viewpoints on school grounds. *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244, 1254 (3d Cir. 1993). The lead opinion in the present case dismissed this prior admonishment in a footnote, noting the school had allowed Coach Borden to participate in prayers with the team in the intervening years. 523 F.3d at 178 n.22. The fact remains that when the current controversy confronted the EBSD, it reverted to the same tactic employed in *Pope*, utilizing every legal means to stifle protected student speech and to demonstrate hostility toward religion.

The EBSD manifests a hostile attitude toward religious viewpoints in several ways. First, the prayer policy threatens termination of any employee who demonstrates respect when the students exercise their constitutional rights. 523 F.3d at 160. Second, EBSD board president Michael Baker derided Coach Borden's desire to demonstrate respect for his players as a "personal agenda" during a board meeting about the policy and the nascent controversy. *Id.* Third, in brief and oral argument before the district court, the EBSD asserted that it simply desired a clarification of the District's and Coach Borden's rights. *Id.* at 185. When the district court ruled against EBSD, however, its anti-religious bias became evident. Now free from potential Establishment Clause litigation, it nevertheless appealed to the Third Circuit. This decision is not surprising given the EBSD's historically anti-religious bias. Just as the Court found a ruse in the

SFSD's supposedly "religion neutral" policy, an equal and opposite ruse is afoot in the EBSD's anti-religion policy. 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring in judgment)). Moreover, much like this Court did not allow the suppression of minority viewpoints in *Santa Fe,* it should not allow the EBSD's suppression of the players' religious viewpoints.

III. The Court should clarify and unify the test in school environment religious expression cases by articulating and adopting a Coercion test which allows passive and symbolic conduct by government actors, protects individual viewpoints, and does not chill constitutionally protected student-initiated and student-led prayer in a school environment.

The Court's self-described "tangle" of various tests leaves circuit courts, district courts and the attorneys practicing in them a confusing, convoluted maze through which they must travel to determine the most efficient way to adjudicate and litigate Establishment Clause cases. *County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment and dissenting in part). Other Justices acknowledge this ambiguity and describe the Court's approaches as "embarrassing," *Edwards v. Aguillard*, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting), and in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring). Legal

scholars also have criticized the Court's seemingly haphazard approach: "a more confused and often counterproductive mode of interpreting [the religion clauses of] the First Amendment would have been difficult to devise." Michael W. McConnell, *Exchange; Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115 (1992). *See also* Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment*, 163 (MacMillan 1986) ("the Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices.").

While scholars may engage in hyperbole, the fact remains that the Court can implement a single straightforward test in this area of constitutional law. The Court's failure to articulate such a standard will result in continuing anomalies like *Borden*. The best alternative to help clarify the disparate standards is the Coercion test articulated by Justice Kennedy in *Lee*. The test discounts passive and symbolic government conduct, ensures the courts will recognize all religious and nonreligious perspectives and provides proper constitutional protections for private speech in this context.

A. The Court currently applies at least three tests for adjudicating Establishment Clause cases like the instant case, which leads to disparate findings of constitutional protection for similar speech.

The oldest of the tests currently employed is the *Lemon* test. First developed in 1971 in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1991), it requires a three-step examination to determine the constitutionality of government action involving religion. Such action: (i) must have a secular purpose; (ii) its primary effect must neither advance nor inhibit religion; and (iii) it must avoid excessive government entanglement with religion to pass constitutional scrutiny. *Id.* The Court rarely follows this test alone, although it is often invoked. For example, the Court has alternately used it when a lower court did not, *e.g.*, *Lamb's Chapel*, 508 U.S. 384, and discarded it when it was the lower court's exclusive analytical tool, *Marsh v. Chambers*, 463 U.S. 783, 786, 792 (1983). The Court has also incorporated the test, but not in a dispositive manner, describing the test's elements as "no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973). Unsurprisingly, multiple Justices, including Kennedy, *Allegheny*, 492 U.S. at 656 (concurring in the judgment and dissenting in part), O'Connor, *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (dissenting), Rehnquist, *Wallace v. Jaffree*, 472 U.S. 38, 108-13 (1985) (dissenting), and Thomas, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45-8 (2004) (concurring), have criticized the

test and/or berated the Court for its uneven application. Justice Scalia's disparagement has been especially acerbic: "[the test] like some ghoul in a late night horror movie that repeatedly sits up in its grave . . . after repeatedly being killed and buried . . . stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys . . . " *Lamb's Chapel*, 508 U.S. at 397 (concurring in the judgment).

The second test, applied more frequently in recent years, is the Endorsement test. This test originated in Justice O'Connor's concurrence in *Lynch*, 465 U.S. at 688. The test is based on the premise that government may neither endorse nor disapprove of religion. A perceived government endorsement of religion sends a message to nonbelievers that they are "outsiders" and to adherents that they are "favored members of the political community." *Id.* The Court employs a "reasonable observer" standard, taking into account the government action's context and history to probe government endorsement. *Pinette*, 515 U.S. at 772. Like its predecessor, this test, while appearing neutral on its face, actually has a strong anti-religious predisposition because the very nature of "establishment" indicates actions imbuing government approval or support for religion. James A. Campbell, *Note: Newdow Calls for a New Day in Establishment Clause Jurisprudence: Justice Thomas's "Actual Legal Coercion" Standard Provides the Necessary Renovation*, 39 Akron L. Rev. 541, 555 (2006). Thus, while a fervently secular

hypothetical government could wipe all religious remnants from society, its actions could not be construed as "establishing" religion. Accordingly, the Court has not applied the Endorsement test to invalidate government activity condemning religion. *Id.* (quoting McConnell, *Crossroads, supra* p.16, at 152).

Justice Kennedy has recognized the inherently flawed nature of the Endorsement test and has written extensively about its shortcomings. He writes in *Allegheny*, 492 U.S. at 668-69 (concurring in the judgment and dissenting in part), the Endorsement test is "flawed in its fundamentals and unworkable in practice," and its addition to Establishment Clause jurisprudence "most unwelcome." One of the problems with the Endorsement test is that it would result in a radical separation of church and state, a result not envisioned by our founding fathers, never required by the Court of any era and anathema to the history and traditions of the United States. *Lynch*, 465 U.S. at 673. As Justice Kennedy noted: "Whatever test we choose to apply must permit not only legitimate practices two centuries old, but also any other practices with no greater potential for an establishment of religion." *Allegheny*, 492 U.S. at 670 (concurring in the judgment and dissenting in part). Indeed, according to Justice Kennedy, "the United States Code itself contains religious references that would be suspect under the endorsement test." *Id.* at 672.

The latest test in the Court's litany is the Indirect Coercion test, first championed by Justice Kennedy in *Lee*, 505 U.S. at 587. It holds the government

may not coerce (directly or indirectly) anyone to support or participate in any religion or its exercise and may not "act in a way which tends to establish a state religious faith or tends to do so." *Id.* While "coercion" is a good basis from which to draw a uniform standard, the subjective nature of indirect coercion has been criticized because it places judges in the position of amateur psychologists rather than jurists, sometimes relying on easily manipulatable psychological studies. *Id.* (Scalia, J., dissenting).

B. The Court should articulate and adopt a single test that does not implicate passive or symbolic government conduct when determining an Establishment Clause violation, yet affords constitutional protection for private speech in a public school environment.

The most sensible test is a Coercion test that discounts passive and symbolic government speech as too tenuous to rise to the level of an Establishment Clause violation. This reasonable and clear standard continues to allow government to sponsor events at which a religious invocation is given, as in *Lee*, while protecting practices that have no likelihood of "establishing a religion or tending to do so." 505 U.S. at 580; *Lynch*, 465 U.S. at 678. Indeed, Justice Kennedy warned of the dangers of making too tenuous a connection between government conduct and the establishment of religion: "Absent coercion, the risk of infringement of religious liberty by passive or

symbolic accommodation is minimal." *Allegheny*, 492 U.S. at 662 (concurring in the judgment and dissenting in part). A Coercion test that eliminates passive and symbolic conduct from consideration remains true to Justice Kennedy's ideals of preventing government coercion while not directly benefiting religion. This test also allows the "benevolent neutrality" absent from the Court's current approaches. *Id.* at 661. Eliminating any passive or symbolic conduct from suspect status would also enable the Court to read the religion clauses of the First Amendment in a manner more closely aligned with the original understanding of the clauses and truer to the United States' history and traditions. "The history of the Religion Clauses dispels any notion that government is forbidden from affirming, through language or symbol, the special status of religion in public life." Christal L. Hoo, *Thou Shalt Not Publicly Display the Ten Commandments: A Call for a Reevaluation of Current Establishment Clause Jurisprudence*, 109 Penn. St. L. Rev. 683, 698 (2004). The government has engaged in passive and symbolic, non-coercive conduct since the founding. The United States remains the envy of the world for its religious tolerance. The government may achieve true neutrality only by applying a test that allows this accommodation to remain and flourish.

CONCLUSION

For the reasons provided above, the petition for *writ of certiorari* should be granted.

Respectfully submitted,

EDWIN MEESE III
Of Counsel
SOUTHEASTERN LEGAL FOUNDATION
6100 Lake Forrest Drive, N.W.
Suite 520
Atlanta, GA 30328
(404) 257-9667

SHANNON LEE GOESSLING
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
6100 Lake Forrest Drive, N.W.
Suite 520
Atlanta, GA 30328
(404) 257-9667

MANUEL S. KLAUSNER
DAVID HOROWITZ FREEDOM CENTER AND INDIVIDUAL RIGHTS FOUNDATION
One Bunker Hill Building
601 West Fifth Street
Suite 800
Los Angeles, CA 90071
(213) 617-0414

ALLAN PARKER
THE JUSTICE FOUNDATION
8122 Datapoint
Suite 812
San Antonio, TX 78229
(210) 614-7157

BENJAMIN W. BULL
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

Counsel for Amici Curiae
Southeastern Legal Foundation, et al.

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